

In the Matter of:

Bitseller Expert Limited, et al.

v.

Verisign, Inc, et al.

Hearing

December 6, 2019



**Court Reporting
Videography
Videoconferencing**

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1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 Alexandria Division
4

5 -----:

6 BITSSELLER EXPERT LIMITED, and :

7 ACCURACY CONSULTING, Ltd., :

8 Plaintiffs, :

9 vs. :Case No.

10 VERISIGN, INC., et al., :1:19-cv-01140-AJT-JFA

11 Defendants. :

12 -----:

13 Alexandria, Virginia

14 Friday, December 6, 2019

15

16 The above-entitled matter came on to be
17 heard before the HONORABLE ANTHONY J. TRENGA, Judge in
18 and for the United States District Court for the
19 Eastern District of Virginia, Alexandria Division,
20 located at 401 Courthouse Square, Alexandria, Virginia,
21 commencing at 9:36 a.m., when were present on behalf of
22 the respective parties:

1 A P P E A R A N C E S

2

3 On behalf of Plaintiffs:

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16 On behalf of Defendants:

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A P P E A R A N C E S

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(Continued)

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On behalf of Defendant:

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action Number
3 1:19-cv-1140, Bitseller Expert Limited versus
4 Verisign, Inc., et al.

5 Counsel, will you please note your
6 appearances for the record.

7 MR. SHAYEFAR: Good morning, Your Honor.
8 Matthew Shayefar for the plaintiffs, and I have with
9 me Val Gurvits and Jeff Geiger.

10 THE COURT: All right. Good morning.

11 MS. SOUTHWICK: Good morning, Your Honor.
12 Tyler Southwick on behalf of defendant, Verisign.

13 MR. HYLAND: And good morning, Your Honor.
14 Tim Hyland for Verisign. And I'm pleased to
15 introduce Ronald Johnston from Arnold & Porter in Los
16 Angeles who's been admitted pro hac and will be
17 handling the substantive portion of the argument
18 today.

19 THE COURT: All right. Welcome.

20 We're here on a motion to dismiss. I
21 reviewed the pleadings. I'd be pleased to hear
22 further from counsel. What I would like to do --

1 you're welcome to structure or emphasize your
2 argument however you want, but I am particularly
3 interested in the effect of the federal court
4 judgment on the conversion claim.

5 Counsel.

6 MR. JOHNSTON: Let me jump right to what
7 Your Honor is identifying. The federal court
8 judgment should be dispositive in this case in
9 causing a dismissal of both of the claims and the
10 grounds that the Court deprived the plaintiffs in
11 this case of the right to possession. It's a
12 fundamental element of the tort of conversion that
13 the plaintiff must have the right of possession. As
14 a consequence of that order, the plaintiff lost the
15 right of possession. There are cases that we've
16 cited to the Court that confirm that principle. The
17 only response to that principle is the plaintiffs'
18 argument that when the part of that order was
19 vacated, that somehow the order disappeared as though
20 it had never existed, something like a rescission of
21 a contract. That's not the law.

22 When the court order was vacated, part of

1 the order was vacated, and after that part of the
2 order, it changed the circumstances that during the
3 entire period during which these claims were in
4 existence or the conduct here alleged took place, the
5 order deprived the plaintiffs of the right to
6 possession of the property. Even in the law of
7 contracts where you have a rescission, you don't
8 create this fiction that nothing ever happened when
9 there's been performance or reliance on the
10 contract --

11 THE COURT: Well, as I understand the
12 plaintiffs' argument, Verisign, upon getting this
13 order from the Court to transfer the domain name, had
14 some obligation to investigate the -- whether the
15 order appropriately considered the rights of the
16 plaintiffs in the domain name and do some kind of
17 investigation or review of the registrant, the
18 history and see if that coincided with the defendants
19 in the case.

20 MR. JOHNSTON: We have two principal
21 responses to that. Number one, we did not transfer
22 the domain name. The transfer of the domain name was

1 effected by a third party, a registrar, issuing a
2 command to our computer which alters a record in our
3 computer, and that effects the transfer of the
4 registrant for the domain name.

5 Verisign engaged in no volitional act, no
6 intentional conduct whatsoever as part of the alleged
7 transfer that's the gravamen of these claims.

8 THE COURT: Well, what did it do then? It
9 made some direction to somebody, didn't it?

10 MR. JOHNSTON: No. It's a fully automated
11 process. Our computers -- domain names are created
12 by a registrant going to a registrar entering into a
13 contract. The registrar, in the simplest case,
14 issues an add command to add the domain name chosen
15 by the registrant to our computer database. That
16 computer database may change over time by reason of
17 changes to the registrant or a deletion of that
18 domain name in our computer database, but those
19 actions are performed based on commands issued by the
20 registrar directly to the database in our computer.
21 Those are third-party actions. The transfer here was
22 completely effected without any conduct by Verisign.

1 The -- one of the cases in the materials
2 we've sited, the Forchion case, goes into some detail
3 in describing what happens. And with the Court's
4 permission --

5 THE COURT: And who is the registrar?

6 MR. JOHNSTON: The registrar was GoDaddy --

7 THE COURT: All right.

8 MR. JOHNSTON: -- who has not been -- for
9 some reason we don't quite understand, is not a party
10 to the case. But if the Court pleases --

11 THE COURT: And who acted in response to
12 the court order then? GoDaddy?

13 MR. JOHNSTON: GoDaddy. The court order
14 was in two parts. The court order directed that
15 Verisign change the registrar of record, which it did
16 do in direct response to the court order. It did
17 nothing more than that. Secondly, the court order --

18 THE COURT: I'm sorry. Just say that
19 again. Verisign did what?

20 MR. JOHNSTON: Verisign changed the
21 registrar of record.

22 THE COURT: All right.

1 MR. JOHNSTON: It did not transfer the
2 domain name --

3 THE COURT: All right.

4 MR. JOHNSTON: -- did not change the
5 registrant. We don't know who the registrant is. We
6 don't have that information.

7 It changed the registrar of record. The
8 registrar of record then, at the urging of the
9 plaintiff in that action, issued a command to our
10 computer to effect a change in the domain name. But
11 in that process in what's alleged to be the wrongful
12 transfer in this case, Verisign committed no
13 volitional act. Verisign has a database. Registrars
14 issue commands directly to the database in order to
15 create actions at the urging of the registrants.

16 If it would assist the Court, I have a very
17 simple one-page illustrative exhibit of what goes on
18 when there's a change in the domain name. The
19 important part of this exhibit, oddly, are the
20 errors. The errors show who does what. The errors
21 in the exhibit show that the registrar, in response
22 to Your --

1 THE COURT: Right.

2 MR. JOHNSTON: -- Honor's questions,
3 actually issues commands, whether it's to add a
4 domain name, delete a domain name, transfer a domain
5 name to the registry computer database. Our computer
6 database has thousands of these transactions going on
7 an hour. It's fully automated. There's no human
8 involvement in the process except rarely, and there's
9 no action by the registry itself.

10 So the notion that the registry converted
11 these domain names or trespassed when the registry
12 did nothing but its computer responded to a command
13 by a third party defies logic. The plaintiffs know
14 that the registrar is the one who does these things.
15 The court order made that clear. Nonetheless,
16 they've sued us without suing the registrar. We get
17 many of these orders to do things, changing
18 registrars, but the orders that go to changing the
19 registrants of domain names such as in this case are
20 orders that are effected without our involvement at
21 all.

22 THE COURT: All right.

1 MR. JOHNSTON: Now, you'll see in this
2 chart, it's very simple. The registrant goes to a
3 registrar. They form a contract. The registrant
4 asks the registrar to create a domain name. To do
5 that, the registrar issues a command to our computers
6 that asks, in effect, is this name already in your
7 computer. If it's not, in simplest form, it's -- the
8 registrar will create that domain name in a computer
9 record in our computer.

10 The registrar controls the actions so to
11 speak. We have and maintain a database, but the
12 registrar has the relationship to the registrant. We
13 have no relationship to the registrant. We do not
14 know who the registrant is. Our database doesn't
15 identify the registrant. Our Whois database that's
16 independently published does not identify who the
17 registrant is. We have a very specific and limited
18 job in this context, and we don't go beyond that job.

19 THE COURT: The court order refers to a
20 top-level domain registrar or their administrators.
21 Would that -- would Verisign fall into that category?

22 MR. JOHNSTON: No. The registrar in the --

1 refers to the GoDaddy --

2 THE COURT: Right.

3 MR. JOHNSTON: -- the middle box.

4 THE COURT: Right.

5 MR. JOHNSTON: Verisign is the registry.

6 In that court order, at one point, there is a
7 reference to "registrar" when it means "registry."

8 THE COURT: Well, I'm reading from the
9 court order. It says, To the extent that the
10 registrars, which I understand from you refers to
11 GoDaddy, does not assist in the changing of the
12 registrars of record within one day of the receipt of
13 the order, the top-level domain registrars or their
14 administrators for the subject domain names within
15 five days shall change.

16 What do you understand the reference to
17 top-level domain registrar means? I'm looking in
18 page 4 of the court order, paragraph C.

19 MR. JOHNSTON: A?

20 THE COURT: Paragraph C, yes, the last
21 sentence there on the bottom --

22 MR. JOHNSTON: To the extent the TLD

1 registrars --

2 THE COURT: Yes.

3 MR. JOHNSTON: -- do not change the
4 registrars of record for the domain name registries
5 -- in other words, the registrar of record --

6 THE COURT: Are you reading the last
7 sentence?

8 MR. JOHNSTON: Yes.

9 THE COURT: It says, To the extent that the
10 registrars do not assist in changing the registrars
11 of record. Then it refers to a top-level domain
12 registrar. What do you understand that reference to
13 be?

14 MR. JOHNSTON: In effect, GoDaddy, the
15 registrar, the middle box. Commonly registrars who's
16 representing somebody who acquires the domain name,
17 for example, will have a registrar that they want to
18 use, and the registrars may transfer who the
19 registrar of record is between themselves, and
20 they'll issue a command to the -- Verisign, the
21 registry database.

22 Here, to the extent that doesn't happen, it

1 says that the registry operator, Verisign, will
2 change the registrar of record to somebody designated
3 by the plaintiff. That happened here, but that's a
4 change in the registrar of record. It's not a change
5 in the domain name. The registrar of record
6 subsequently changed the domain name to a new
7 registrant pursuant to a contract with the
8 registrant.

9 THE COURT: Well, I understand that, but
10 how do you understand the court order -- who is to
11 act under this court order as the top-level domain
12 registrar if the registrar of record does not act
13 within one day? Who is to act within five days?

14 MR. JOHNSTON: Well, that would be the
15 registry.

16 THE COURT: Verisign?

17 MR. JOHNSTON: Yes. Verisign, who would
18 assist by changing the registrar of record, not
19 assist by changing the registrant or transferring the
20 domain name.

21 THE COURT: I understand. And in this
22 case, did the registrar of record, GoDaddy, effect

1 the change within one day, or did Verisign have to do
2 something?

3 MR. JOHNSTON: Verisign changed the
4 registrar of record.

5 THE COURT: Because GoDaddy hadn't done
6 it --

7 MR. JOHNSTON: Well, it was originally
8 registered with EuroDNS, a different registrar --

9 THE COURT: All right.

10 MR. JOHNSTON: -- who refused to comply
11 with the change --

12 THE COURT: All right. So Verisign
13 changed --

14 MR. JOHNSTON: So the plaintiffs in the
15 lawsuit went to Verisign and said, we want to change
16 the registrar of record to GoDaddy. So they changed
17 the registrar of record to GoDaddy, and then GoDaddy
18 implemented the transaction that's the subject to the
19 claim.

20 THE COURT: All right. And that was in
21 response to the order that somebody at Verisign had
22 seen?

1 MR. JOHNSTON: Verisign would have seen --

2 THE COURT: The order.

3 MR. JOHNSTON: -- this order, I believe.

4 That's not pled, but the order --

5 THE COURT: Well, would they have acted in
6 the absence of an order --

7 MR. JOHNSTON: The order actually --
8 there's another part to this order. This order asks
9 that immediately registries stop supporting the
10 domain name.

11 THE COURT: Right.

12 MR. JOHNSTON: Now, that requested
13 immediate action. It also asked that this other
14 process takes place within five days. So Verisign,
15 in its records, doesn't have anything other than the
16 face of the order to help it interpret the order.
17 The order on its face commanded Verisign immediately
18 to take certain actions, which it took. Within
19 Verisign's access to information, we don't know who
20 the registrant is. We don't know beyond the order
21 what the case is about. And we just complied with
22 the order to the letter.

1 THE COURT: All right.

2 MR. JOHNSTON: I mean, there's no dispute
3 about that part of it.

4 THE COURT: All right.

5 MR. JOHNSTON: So that deprived them --
6 this order deprived them of the right to possession.
7 Now, the order could well refer to them. We wouldn't
8 know necessarily. The order refers to defendants and
9 anyone acting in concert with them. According to the
10 plaintiffs, they were, in fact, operating the
11 website. So even if we investigated for the
12 following six months, we could well have concluded
13 that, yeah, they were operating in concert with the
14 defendants, including because when the order was
15 entered, they didn't stop supporting the domain name.
16 So there is no way to distinguish these plaintiffs
17 from the conduct of a group of people that the Court
18 clearly sought to enjoin and clearly --

19 THE COURT: I understand.

20 MR. JOHNSTON: Okay. I want to direct
21 my -- did I address your question fully?

22 THE COURT: Yes.

1 MR. JOHNSTON: Okay. The -- each of
2 these -- each of the claims requires not only a right
3 to possession, which we've discussed. We think they
4 were deprived of that right to possession. We cite
5 two cases that very clearly say that. Secondly, each
6 of these claims require some exercise of dominion and
7 control over the domain name. And we tried to
8 illustrate with our exhibit that we've provided to
9 the Court there's nothing we did that could
10 constitute the exercise of dominion and control over
11 the domain name registrant or the domain name because
12 we took no act to change the database record
13 regarding that domain name as registrant, the domain
14 name, apart from the computer responding to an order
15 from the third party.

16 We also believe that the law is clear here,
17 including an opinion by this Court earlier, that
18 domain name is not the kind of property that's
19 embodied in a document or other tangible thing such
20 that this clearly intangible item could be the
21 subject of a claim for conversion or trespass. They
22 cite no cases to the contrary save one, a Ninth

1 Circuit case, the Kremen case. That case, however,
2 was predicting what California courts would do.
3 California courts did not go in the direction and,
4 instead, suggested that in their view, domain names
5 were not subject to conversion because they were not
6 in any tangible form.

7 The -- but quite beyond that, we think it's
8 clear Virginia law applies, which we could address if
9 the Court wishes, because a different California
10 court, in response to a complaint by these same
11 plaintiffs against Verisign, dismissed the complaint
12 on the grounds that there was no venue or personal
13 jurisdiction because no actions or conduct by the
14 registry had any relationship with California. So
15 there's no basis here for California law to apply.
16 And the only other places mentioned by the
17 plaintiffs, Cyprus and another foreign country, the
18 plaintiffs don't say what the law is, so there's no
19 true conflict.

20 So if we look at Virginia law, Virginia
21 law, we think, is clear that this is not property
22 that's subject to a claim for conversion or trespass.

1 THE COURT: All right.

2 MR. JOHNSTON: There's no document in which
3 it embodies. And once you go beyond some link
4 between an intangible item and its merger into
5 something tangible, you really make all of the
6 elements of these claims for conversion and trespass
7 kind of illusory. I mean, it's hard to say what they
8 would mean because there's no possession, there's no
9 interference with its use that's observable.

10 The -- so the courts have tended to require
11 that there's some merger for very good reason. There
12 is none here. They've suggested that the merger is
13 with the domain name system, which I don't
14 understand. The domain systems network knows
15 hundreds of millions of domain names. It's not
16 something into which their domain name merges in the
17 identifiable way that supports either a claim for
18 conversion or trespass.

19 I would be happy to address any other
20 issues the Court has.

21 THE COURT: All right. Let me hear from
22 the plaintiffs.

1 MR. SHAYEFAR: Good morning, Your Honor.

2 Thank you very much.

3 THE COURT: Good morning.

4 MR. SHAYEFAR: Your Honor, I will first go
5 to what was your initial question regarding the court
6 order.

7 THE COURT: Right.

8 MR. SHAYEFAR: At a very basic level, this
9 court order was never supposed to apply to these
10 domain names.

11 THE COURT: Why do you say that? It
12 specifically references them.

13 MR. SHAYEFAR: So, Your Honor, looking at
14 Section 5(A) and going to the page of top of page 4
15 of the order, the -- what we've been talking about
16 here is how the order applies to, quote, subject
17 domain names. And subject domain names is defined as
18 a number of domain names that are operated
19 by defendants, defendants in that prior class-action
20 lawsuit filed in the Northern District of California.
21 There is no question, though, that the domain name
22 was not operated by defendants --

1 THE COURT: Well, but the domain name
2 isn't -- is specifically included there, isn't it?

3 MR. SHAYEFAR: It is, Your Honor, but it
4 says, as it is operated by defendants. So at the
5 very least, we have an issue. I mean, if it wasn't
6 clear to Verisign whether this applies or not, the
7 court order, again, at the very end, bottom of page 5
8 says, If there are any third parties -- that would be
9 Verisign here -- subject to this order may seek
10 relief from the court if they believe the scope of
11 injunctive relief requires clarification or
12 correction.

13 It's all there. There was no issue for
14 Verisign to say, hey, there's an issue here, there's
15 a problem here.

16 And then so going then to Section 5(C),
17 which is where the transfer takes place, Your Honor,
18 I'm genuinely not sure what it means by top-level
19 domain registrars. As counsel noted, there are two
20 parties -- there are three parties here. There's the
21 registrant, the registrar and the registry. The
22 first section does refer to registrar. I mean, the

1 court order is, quite frankly, vague.

2 Where it does refer to registry, though,
3 which is, again, where Verisign comes in, as I
4 believe Your Honor noted, the very last sentence of
5 Section 5(C), which says, To the extent that the TLD
6 registrars for the subject domain names do not change
7 the registrars of record for the subject domain
8 names, the domain name registries -- this is the
9 first time that registries is specifically talked
10 about with regard to transferring the domain name --
11 that's where they shall transfer, assist in
12 transferring the subject domain names to class
13 counsel.

14 There is no five-day limitation on this.
15 There is no one-day limitation on this. The court
16 gave Verisign the option to come and ask for a
17 clarification because there's obviously an issue on
18 its face with this thing. Verisign did no such
19 thing. They simply rubber-stamped this order and
20 transferred --

21 THE COURT: Well, I guess I'm trying to
22 understand from both your perspective and Verisign's.

1 They get a court order, federal court order that
2 specifically identifies a domain name that's to be
3 transferred, and your position is that they should
4 have done what? Looked behind the court order and
5 determined whether the court actually meant to
6 adjudicate the ownership of these particular
7 plaintiffs in the domain -- or these particular
8 defendants in the domain name --

9 MR. JOHNSTON: Your Honor, I think --

10 THE COURT: -- because it talks about
11 defendants generally. The defendants aren't listed
12 in the caption even. It just talks about et al. It
13 talks about defendants and everybody acting in
14 concert with them.

15 Why wouldn't someone looking at this
16 reasonably think that the federal court, if we're
17 issuing this order here to adjudicate it, the
18 relative rights of the parties and to verify who
19 owned the domain names and adjudicate whether those
20 people had a legitimate interest and made its
21 adjudication that the domain name needed to be
22 transferred based on an adjudication with the

1 relevant information?

2 MR. SHAYEFAR: Your Honor, this sort of
3 goes to a much larger issue with this case. This
4 case is not only redars.com. This case is about
5 Verisign, which is the backbone of the internet, and
6 whether it had any obligation to exert any sort of
7 reasonable care in its operation of the DNS system or
8 the domain name registry system.

9 So this court order is so broadly written
10 that it says any defendants or anybody working in
11 their concert and any other domain names that could
12 possibly be part of this. Under this court order,
13 the attorneys for the class-action plaintiffs could
14 have come to Verisign and said, well, the domain name
15 Amazon.com is also being operated in conjunction with
16 it. Transfer that to us. There's nothing in this
17 order that says they can't --

18 THE COURT: Well, except that Amazon.com
19 isn't listed as a specific domain name.

20 MR. SHAYEFAR: Well, Your Honor, the court
21 order does say and it defines subject domain names as
22 all other websites that display, publish or

1 disseminate information about the subclass members.

2 THE COURT: Right. And so -- I mean, I can
3 understand it would have some -- I could understand
4 if they came and said, all right, transfer Amazon.com
5 because it's a website also operated by the
6 defendants, that there would be some question about
7 whether that, in fact, is the case. But here you
8 have very specific websites already identified in the
9 court order.

10 MR. SHAYEFAR: And, Your Honor, but so
11 that's the issue. From what I'm hearing, at some
12 point, there is a duty of care on their part to say,
13 well, this doesn't make sense. So --

14 THE COURT: Let me just ask a side
15 question. Have you all proceeded against the
16 plaintiffs in the California case?

17 MR. SHAYEFAR: No, we have not yet, Your
18 Honor. No.

19 THE COURT: All right. And you're not a
20 defendant -- the California action is not pending; is
21 that right?

22 MR. SHAYEFAR: The original class-action

1 suit?

2 THE COURT: Yeah.

3 MR. SHAYEFAR: I believe that the judgment
4 has been issued and there's nothing further
5 proceeding in that case.

6 THE COURT: All right.

7 MR. SHAYEFAR: They have not amended the
8 complaint --

9 THE COURT: And did you intervene for the
10 purposes of obtaining the relief, or did you just
11 simply file a motion?

12 MR. SHAYEFAR: We filed a motion for
13 relief, Your Honor. I don't remember the --

14 THE COURT: But you didn't intervene as
15 defendants?

16 MR. SHAYEFAR: No. We did not become
17 party, so it was simply as third-party movements in
18 the case.

19 THE COURT: All right.

20 MR. SHAYEFAR: Your Honor, I would like to
21 proceed on a couple of other issues --

22 THE COURT: All right.

1 MR. SHAYEFAR: Counsel has been dancing
2 around the fact of what Verisign did. And either
3 they did something or they didn't. And what Verisign
4 did here was regardless of what happened after they
5 took action, Verisign's action was to divest control
6 of the domain name away from the plaintiffs in this
7 case, and they did that --

8 THE COURT: Well, as I understand, they
9 replaced the registrar or substituted the registrar,
10 who, in turn, did what was necessary to transfer.

11 MR. SHAYEFAR: Right. So first off, Your
12 Honor, this is -- none of this is in the complaint.
13 We're in the motion-to-dismiss stage here.

14 THE COURT: Right. I understand.

15 MR. SHAYEFAR: So assuming that Your Honor
16 is taking a look at any of this, the domain name was
17 registered with a registrar EuroDNS --

18 THE COURT: Right.

19 MR. SHAYEFAR: -- where it is my clients
20 had an account where they could control an access to
21 the domain name. That's the only place that they had
22 access to it. What Verisign did was take it

1 completely out of that domain name registrar's
2 control and put it into GoDaddy, where my clients had
3 no control, had no account, had no ability to do
4 anything anymore. And Verisign did that specifically
5 with the intent that it would be held then by the
6 California counsel, and they could do what they want
7 with it.

8 Yes, GoDaddy did some action in between
9 there, yes, the lawyers did some action as well, but
10 the nucleus, the reason all of this happened was
11 because Verisign took it -- and this is their actual
12 voluntary action -- took it out of the control of the
13 plaintiffs. That was a voluntary action. I don't
14 think that counsel can get up here and make the claim
15 that they did not take that voluntary action of
16 taking it out of the control of them. What they're
17 dancing around the issue is other people did
18 something after we did our action --

19 THE COURT: Well, as I understand it, based
20 on the court order, they did what you've said because
21 the registrar of record didn't act within one day of
22 the court order.

1 MR. SHAYEFAR: Correct, Your Honor.

2 THE COURT: Right. And they were under an
3 obligation to then act within five days of the court
4 order.

5 MR. SHAYEFAR: Your Honor, there is no --
6 as I noted, the obligation for them has no timeline
7 on it. That is the last sentence of Section 5(C) on
8 page 5.

9 THE COURT: Uh-huh. It says, To the extent
10 that the registrar of record, which is the Euronet,
11 correct?

12 MR. SHAYEFAR: So it says, To the extent
13 that the TLD registrar -- and, Your Honor, again,
14 there is no TLD registrar. Those are two conflicting
15 terms that are being used here. So I don't know what
16 the court meant. And, again, because this was a
17 default, it was probably written by counsel, the
18 class-action counsel. But if we assume that TLD
19 registrar refers to EuroDNS, which is the registrar,
20 for the subject domain names, do not change the
21 registrars of record, which, again, I don't know --

22 THE COURT: Well, it says, To the extent

1 the registrar do not assist in changing -- I see what
2 you're saying.

3 MR. SHAYEFAR: The order, Your Honor, is
4 just frankly ambiguous, but to -- the only time that
5 it says registry, the registry, that says, in case
6 these other people don't do it, that's when the
7 domain name registries shall transfer or assist in
8 transferring the subject domain name.

9 That was Verisign's obligation, if any,
10 under this. And, again, Your Honor, subject domain
11 names, questionable whether it applies to -- at all
12 to the redars.com domain name. And, again, the court
13 gave them an out. The court specifically told them
14 to ask the court if there is any issue, or at the
15 very least, Verisign could have sent a notice to
16 Accuracy that we're going to take this action. We've
17 received this order. They did nothing. All they did
18 was represent the order where it was not clear, which
19 gave them an option to go to the court and ask for
20 clarification.

21 Verisign says it doesn't have access to who
22 the registrant is. It's not true. If you go to

1 Verisign.com/whois, I believe, Your Honor, they
2 operate -- they have available on their website
3 access to the Whois database, which specifically
4 listed Accuracy as the domain name registrant. They
5 didn't look at it, or maybe they did and they didn't
6 care. That's one of the issues here.

7 We don't know why Verisign did what it did.
8 We don't know how much effort Verisign actually took
9 to look at this thing. We don't know if Verisign
10 simply looked at a cover letter from the plaintiffs'
11 lawyers and said, hey, this domain name needs to be
12 transferred, here's an attached order, and they did
13 it without looking at the order. We don't know
14 because we haven't gotten to discovery yet. But they
15 did nothing except transfer the domain name out of
16 the control of the plaintiffs.

17 THE COURT: All right.

18 MR. SHAYEFAR: Counsel mentioned the case
19 of In re: Forchion, which, Your Honor, frankly, I'm
20 very happy to bring up because it is such a weird
21 case and it, frankly, has nothing to do with any of
22 the causes of action here. That was a name-change

1 petition by an individual who wanted to change his
2 name to NJWeedman.com. That's the full name that he
3 wanted to pick. And in dicta, the court goes over
4 and references some of the cases, including cases
5 which claim that domain names are not property, but
6 in no way was that California court trying to
7 determine whether a cause of action for conversion
8 applies in California.

9 And, Your Honor, if you want some cases
10 from California Appeals Courts which do confirm that
11 there's a cause of action encouraged against domain
12 name, I have a number of cases here I'm happy to read
13 for you, Your Honor.

14 THE COURT: All right. Let me just go back
15 to the court order again.

16 MR. SHAYEFAR: Sure.

17 THE COURT: I understand what -- you're
18 saying that under paragraph C, Verisign is not
19 implicated, they're not addressed, and that's the
20 subject of this court order until you get to the very
21 last sentence of paragraph C --

22 MR. SHAYEFAR: That's the way that I read

1 the order, Your Honor.

2 THE COURT: All right.

3 MR. SHAYEFAR: Frankly, it is a very
4 ambiguous order, which is one of the biggest problems
5 with this.

6 THE COURT: All right.

7 MR. SHAYEFAR: I'd just like to confirm --
8 conclude, Your Honor, with we're talking about here
9 some of the most valuable assets of any internet
10 companies in the world. If there is no duty at all
11 for Verisign to act in any way reasonable on this,
12 there's nothing to stop them, especially because they
13 claim that there is no cause of action for
14 conversion, period, whether or not the court order
15 was applied.

16 There's nothing to stop Verisign from one
17 day deciding, for no reason, that they want to take
18 over the Amazon.com domain name or transfer it away
19 from Amazon or Google.com or Facebook.com because
20 they're claiming they have no contractual
21 relationship with any registrants, they are claiming
22 that it's not property, they're claiming nothing,

1 that it's -- they're simply maintaining a database, a
2 database which can divest control of these domain
3 names from the most powerful companies in the world
4 and have no responsibility to them and those
5 companies would have no remedy.

6 THE COURT: So how would you frame the
7 issue, whether Verisign acted reasonably in response
8 to this court order?

9 MR. SHAYEFAR: I think that -- well,
10 conversion is a strict liability tort.

11 THE COURT: No. I understand. But in
12 terms of the wrongfulness aspect of the tort, they're
13 relying on a federal court order, and the Court
14 should evaluate whether that negates the wrongfulness
15 aspect of the conversion tort based on what legal
16 measure, whether they acted reasonably in response to
17 the court order?

18 MR. SHAYEFAR: Yes, Your Honor. That's one
19 of the issues. So looking at -- and there's no --

20 THE COURT: But you would agree that would
21 be the relevant inquiry, whether they acted
22 reasonably in response to the court order?

1 MR. SHAYEFAR: I think that that is part of
2 a response to their affirmative defense. Their
3 affirmative defense is, hey, we have this court
4 order; that's what gives us protection against your
5 conversion. That affirmative defense, the best we
6 can find, that I've found, is Section 266 of the
7 Restatements, Second, of Torts, and that does require
8 parties like Verisign, when they receive orders like
9 this, to act reasonably, which is our claim that they
10 did not act reasonably.

11 THE COURT: All right.

12 MR. SHAYEFAR: And, Your Honor, if Your
13 Honor finds that these causes of action do not
14 proceed as they are, we respectfully request leave to
15 amend to add causes of action for negligence and
16 tortious interference because there must be, under
17 the common law, some cause of action that allows
18 remedies for these parties and allows remedies in
19 case Verisign does it to any of these other people.

20 Many of the conversion cases which have
21 been referenced by defendants are between private
22 parties. Those are different -- those have a

1 different feeling to them if someone goes in and
2 changes your domain name. When Verisign, which has
3 control over it entirely, does it, it's a whole
4 different ball game, Your Honor.

5 THE COURT: When did the plaintiffs first
6 realize that they had lost control over the domain
7 name?

8 MR. SHAYEFAR: Immediately after the domain
9 name was moved to -- to point to another website.

10 THE COURT: And that was when?

11 MR. SHAYEFAR: It would have been in --

12 THE COURT: 2018?

13 MR. SHAYEFAR: I think so. It would have
14 been a few days before we filed the motion, Your
15 Honor. I remember very quickly moving to file that
16 motion. It's the first we found out about it.

17 THE COURT: And when did they act in the
18 California action?

19 MR. SHAYEFAR: So we had filed that motion
20 for relief, and then immediately after we filed it,
21 we worked with the class-action plaintiffs' lawyer to
22 at least redirect the domain name back to the actual

1 website. I think maybe within a week, maybe a little
2 more than that, maybe less. I can't remember
3 exactly, Your Honor. And then it was within two or
4 three months that the court issued its relief from
5 the motion, which then actually transferred the
6 domain name back to the control of --

7 THE COURT: So how long have they been --
8 when did they first regain control of the website?

9 MR. SHAYEFAR: Full control, Your Honor, it
10 would be between -- it is in the complaint. We filed
11 the motion on March 1st, and on May 4th, the court
12 issued its ruling on the emergency order.

13 THE COURT: 2018?

14 MR. SHAYEFAR: 2018, yes.

15 THE COURT: All right. Thank you.

16 MR. SHAYEFAR: Thank you, Your Honor.

17 THE COURT: All right. Counsel, I'll give
18 you the last word on this.

19 MR. JOHNSTON: As the last comment
20 indicates, with Verisign, the court order issued that
21 Verisign has to do something immediately within five
22 days. It's strange credibility to think that

1 Verisign could investigate this, seek relief from the
2 court, get an interpretation of this within that
3 period of time based on how long it took them to take
4 action and get a decision vacating a piece of the
5 order. It wasn't the whole order; it was a piece of
6 the order.

7 Counsel asked for leave to amend so that it
8 can state negligence claims or something else under
9 the error. There has to be a duty. There is no duty
10 here in tort based on Verisign's relationship with
11 these parties. There are contracts, there is an
12 entire registry structure that's in place that
13 precludes parties from doing different things. But
14 the notion that this is simply the Wild West and
15 Verisign can go do anything it wants, notwithstanding
16 its contracts with the Department of Commerce that
17 has oversight as well as ICANN, is ridiculous.
18 There's no basis for a duty that's been alleged or
19 argued here or is present in any of the cases for
20 what they're asking this Court to do to give it leave
21 to amend. We think that there should be no leave to
22 amend because we think it's clear that these claims

1 have no basis in law. And, therefore, it would just
2 end up being another round of briefing that we think
3 would result in the same conclusion.

4 I would like to respond to a couple of very
5 specific things.

6 THE COURT: All right.

7 MR. JOHNSTON: Counsel said this order is
8 very ambiguous. It's not ambiguous. There's the one
9 typo where registrar was used where registry
10 obviously was intended, and there's never been any
11 debate about that.

12 THE COURT: Well, look at paragraph 5. As
13 you read that, what portion of that paragraph is
14 directed to Verisign? Is it the last paragraph -- is
15 it the reference to a top-level registrar, or is it
16 the last sentence of that paragraph?

17 MR. JOHNSTON: Verisign is referenced in
18 paragraph 5 --

19 THE COURT: C.

20 MR. JOHNSTON: -- C, last -- basically the
21 last several words on page 4 --

22 THE COURT: As a top-level registrar?

1 MR. JOHNSTON: Yes. That's the typo. That
2 should be registry. And then in the last sentence,
3 it says, domain name registries where the court got
4 it right. That's a reference to Verisign. Yeah.

5 THE COURT: Well, but that -- the last
6 sentence distinguishes between domain name
7 registries, which is Verisign, and top-level domain
8 registrars.

9 MR. JOHNSTON: Right. What I'm saying is
10 the first time that it's used at the bottom of the
11 previous page is just an error. It should have been
12 top-level registry.

13 THE COURT: Well, what's a top-level
14 registry?

15 MR. JOHNSTON: That's Verisign, top-level
16 domain.

17 THE COURT: All right.

18 MR. JOHNSTON: Second-level domain is what
19 people register.

20 But there's no, otherwise, ambiguity in
21 this order. Counsel does also suggest, well, there's
22 this language at the end, that it's just supposed to

1 address domain names owned by the defendants. Well,
2 the order explicitly addresses, as the Court pointed
3 out, redars.com.

4 Furthermore, in their application or in the
5 lawsuit they filed in Los Angeles, they stated that
6 this order required the transfer of that domain name.
7 So --

8 THE COURT: This necessarily in the record,
9 but is Verisign able to identify a specific person
10 who reviewed this order and when that person reviewed
11 the order and acted?

12 MR. JOHNSTON: Verisign may be able to
13 identify the person who reviewed the order. The
14 order may have come in and reviewed by a person --

15 THE COURT: Is there --

16 MR. JOHNSTON: I don't know that -- the
17 only reason I don't know that is because the transfer
18 itself, Verisign didn't do. So the most Verisign
19 would have done is look at this to see if the order
20 is --

21 THE COURT: There must be some record of
22 the order being transmitted and received --

1 MR. JOHNSTON: I'm sure there's a record
2 that the order was received by Verisign, but that --
3 you know, the order, on its face, is clear about the
4 domain name, the registry and the time limits and the
5 immediacy of this. And Verisign probably gets a
6 thousands of these a year -- and this is outside the
7 record -- but, you know, Verisign can't go litigate
8 around the country every time it gets an order from a
9 court that allows a registrar to change a domain name
10 in Verisign's computer.

11 So -- but to answer Your Honor's question,
12 I suspect there was a person.

13 One other comment. Counsel said Accuracy
14 is listed in our Whois database. That's not right.
15 The information that we have is in the last box on
16 that illustrative exhibit I gave to the Court.

17 THE COURT: All right.

18 MR. JOHNSTON: Thank you.

19 THE COURT: All right. Thank you.

20 The Court will take it under advisement.

21 I'll get you a decision just as soon as I can.

22 MR. JOHNSTON: Thank you, Your Honor.

1 THE COURT: All right. Thank you.

2 MR. SHAYEFAR: Thank you, Your Honor.

3 (Whereupon, at 10:36 a.m., the
4 proceedings were concluded.)

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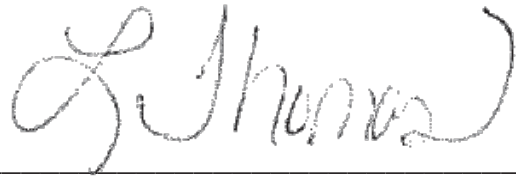
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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, LAQUICIA THOMAS, Court Reporter and Notary
3 Public in and for the Commonwealth of Virginia at
4 Large, and whose commission expires February 28, 2022,
5 do certify that the foregoing is a true, correct, and
6 full transcript of the proceedings.

7 I further certify that I am neither related to
8 or associated with any counsel or party to the
9 proceedings; nor otherwise interested in the event
10 thereof.

11 
12
13

14 LaQuicia Thomas
15 Notary Public
16 Commonwealth of Virginia at Large
17 Notary No. 7363169
18
19
20
21
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